

# YALE LAW JOURNAL

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Published monthly during the Academic Year by the Yale Law Journal Co., Inc.  
Edited by Students and members of the Faculty of the Yale School of Law.

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SUBSCRIPTION PRICE, \$4.50 A YEAR

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## CONFISCATION OF PRIVATE ENEMY PROPERTY

How long must an ancient belligerent practice have fallen into disuse before it can be said to have become obsolete as a matter of law? The English Court of Appeal in the recent case of *Re Ex-Czar of Bulgaria's Property*,<sup>1</sup> in holding that the Crown's prerogative "right" of forfeiture of enemy private property in England was superseded by the Trading with the Enemy Act, under which such property was vested in the Public Trustee as custodian of enemy property, nevertheless decided that the common-law privilege of confiscating the private property of enemy subjects had not been abrogated.

Possibly no single custom of war incidental to the advance of civilization, since the time when war was the normal and peace the abnormal relation between states, has been deemed more firmly rooted in law and practice than the immunity from confiscation of the private property on land of enemy subjects, not violated since the Napoleonic

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<sup>1</sup> (1920, C. A.) 123 L. T. R. 661.

wars. It was considered to have become as obsolete as the asportation and enslavement of the enemy's women and children. Inasmuch as custom and usage are among the most authoritative sources of international law, the writers had some justification for asserting that an ancient barbarous practice, not employed for a century, had now been replaced by the modern humane rule of immunity of private property from confiscation.<sup>2</sup> During the recent war, several decisions of the House of Lords and other high courts had held uniformly that it was not the law that the property of enemy subjects was confiscated in time of war.<sup>3</sup>

But since the Treaty of Peace has adopted provisions looking to the confiscation of enemy private property sequestered during the war,<sup>4</sup> the English courts appear to have deemed it necessary to find some legal justification for this revolutionary step; and they have done so by reverting for authority to the Year Books, the dicta of numerous

<sup>2</sup> Wheaton, *International Law* (Phillipson's ed. 1916) 417-422, 424-426; Halleck, *International Law* (3d ed. 1893) ch. 21, secs. 12-21; Hall, *International Law* (6th ed. 1909) 431-435, (7th ed. 1917) 459-464; 2 Oppenheim, *International Law* (3d ed. 1920) sec. 102; 2 Westlake, *International Law* (1910) 36-44; 7 Moore, *Digest*, sec. 1151, 1155; Latifi, *Effects of War on Property* (1909) 39-49.

<sup>3</sup> See, e. g. Lord Finlay in *Stevenson v. Aktiengesellschaft für Cartonmagenindustrie* [1918, H. L.] A. C. 239, 244: "It is not the law of this country that the property of enemy subjects is confiscated. Until the restoration of peace the enemy can, of course, make no claim to have it delivered up to him, but when peace is restored he is considered as entitled to his property with any fruits it may have borne in the meantime." See also Lord Haldane in same case, *id.*, 247; Lord Parker in *Daimler Co. v. Continental Tyre and Rubber Co.* [1916] 2 A. C. 307, 347; Lord Birkenhead in *Fred Krupp Aktien-Gesellschaft v. Ocronera* (1917) 88 L. J. Ch. 304, 309; Cardozo, J. in *Techt v. Hughes* (1920) 229 N. Y. 222, 128 N. E. 185; L. Hand, J., in *Stoehr v. Wallace* (1920, S. D. N. Y.) 269 Fed. 827, 839.

<sup>4</sup> Art. 297, sec. (b): "Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging . . . to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty."

France, Belgium and Japan appear to have availed themselves to the fullest extent of this power. Great Britain has done so, with the exception of household effects to the value of £500, where the income of the German owner does not exceed £400 per year. (British-German Agreement of Dec. 31 1920.) Germans resident in England can recover property to the value of £1000 and those formerly resident in England but now residing elsewhere, £200. Italy has exempted from confiscation property to the value of 50,000 lire, and is holding the rest in abeyance. Yugoslavia is also proceeding slowly, not having fully determined her policy. Cuba and Guatemala seem to have returned the sequestered property to its owners, and possibly other Latin-American countries have pursued the same policy. The United States has not yet passed any Act of Congress returning the property, although the Knox Resolution looks to such return, conditional upon Germany satisfying the war claims of American citizens against her.

decisions, and the references of writers to the old and abandoned practice, distinguishing away on unconvincing grounds the square decision to the contrary of Lord Ellenborough in 1817 in *Wolff v. Oxholm*,<sup>5</sup> to the effect that a Danish ordinance confiscating a debt owed by a Danish to a British subject was invalid as a defense to a claim made by the British subject after the war, as it was contrary to the law of nations.

Grotius, Bynkershoek and Vattel, writing in the seventeenth and eighteenth centuries, while recognizing the existence of the practice of confiscation, condemned it.<sup>6</sup> Marshall, as early as 1814, in the famous case of *Brown v. United States*,<sup>7</sup> while recognizing the physical power and the practice of confiscation in the past, said that "according to modern usage," private property of the enemy found in the national territory "ought not to be confiscated." He added that "this usage" . . . cannot be disregarded by [the sovereign] without obloquy." Justice Wilson in *Ware v. Hylton*,<sup>8</sup> said: "By every nation, whatever its form of government, confiscation of debts has long been considered 'disreputable.' Debts, of course, are merely one form of property. Clifford, J., in *Hanger v. Abbott*<sup>9</sup> called confiscation "a naked and 'impolitic right, condemned by the enlightened conscience and judgment of modern times.'"<sup>10</sup>

Far from legalizing the practice of confiscation, these cases indicate that the practice, whenever exercised, was deemed contrary to the modern rule of law, which, by usage, and by the desuetude and universal condemnation of the ancient practice, had become the existing law of nations.

That it was not the intention of Congress to confiscate the German private property found in the United States on the outbreak of the recent war appears clearly from the congressional debates and reports of committees.<sup>11</sup> The Trading with the Enemy Act of Oct. 6, 1917,<sup>12</sup>

<sup>5</sup> (1817, K. B.) 6 M. & S. 92. But see the dictum of Dr. Lushington in *The Johanna Emilie* (1864, Adm.) Spink, 14.

<sup>6</sup> See citations in Hamilton's *Camillus Letters XIX*, in defense of article 10 of the Jay Treaty with Great Britain of 1794, 5 Hamilton's *Works*, and Wheaton, *op. cit.* note 2 *supra*, at pp. 417-419. Story in his dissenting opinion in *Brown v. United States* (1814, U. S.) 8 Cranch 110, 140, seeks to show that only Vattel found the practice illegal and that Grotius, Bynkershoek and others supported it.

<sup>7</sup> 8 Cranch, 110, 128.

<sup>8</sup> (1796, U. S.) 3 Dallas, 198.

<sup>9</sup> (1867, U. S.) 6 Wall. 532.

<sup>10</sup> Dicta to the same effect are to be found in *Briggs v. United States* (1892) 143 U. S. 346, 12 Sup. Ct. 391; *Young v. United States* (1877) 97 U. S. 39, 60; *Mrs. Alexanders' Cotton* (1864, U. S.) 2 Wall. 404, 419. See also 1 Kent, *Commentaries*, 65, 73. The case of *Miller v. United States* (1870, U. S.) 11 Wall. 268 involved acts of forfeiture as a penalty for treason. Act of Aug. 6, 1861 (12 Stat. at L. 319); Act of July, 16, 1862 (12 Stat. at L. 589).

<sup>11</sup> *Cong. Record* (65th Cong. 1st sess.) 4844 ff. Sen. Rep. 113 (65th Cong. 1st sess.); H. R. Rep. 85 (65th Cong. 1st sess.).

<sup>12</sup> Public, No. 91, 65th Cong.

and the proclamations issued thereunder affirm that the Alien Property Custodian is a "common-law trustee" only. Yet this suffices to enable him to sell property.<sup>13</sup> Questions will arise, on the conclusion of peace with Germany, whether further seizures can be effected, of property, for example, for which a "demand" had been made by the Custodian prior to July, 1919. It is intimated by Judge Learned Hand in *Stoehr v. Wallace*<sup>14</sup> that the "demand" divested the enemy's "rights" against an American debtor, but this of course does not mean that the enemy's "rights" as owner of the property are divested. Judge Hand said that "the capture" settles nothing except "bare sequestration" or "possession." In an English case, decided since the Treaty of Versailles,<sup>15</sup> it was held that the English Custodian was neither an agent nor trustee of the enemy owner, and that the beneficial ownership of the property, pending disposition by statute, was in a state of suspense. During the war, it had been held to be in the enemy.<sup>16</sup> It would seem that after peace, no further captures, even on outstanding demands, should be made; indeed, there is strong authority for the view that any captures, on land or sea, following the armistice are acts of hostility inconsistent with an armistice and hence violative of international law.

In *Stoehr v. Garvan*<sup>17</sup> the Supreme Court held that article 23 of the Treaty of 1799 with Prussia,<sup>18</sup> providing that in case of war "merchants of either country then residing in the other" shall be allowed nine months within which to collect their debts and withdraw their property, applies only to German merchants "residing" in the United States, and not to non-residents. This seems too literal a construction of the treaty, which was designed to protect the pre-war property of German nationals, rather than the property of residents only. As such treaties were common in the early nineteenth century, the Supreme Court's interpretation would protect only such property as the owner had physically followed, leaving his property in other countries without protection. Story is charged by a recent English writer<sup>19</sup> with a similar misconstruction of Magna Carta, whose protection Story thought extended only to domiciled foreign merchants. The interpretation seems incompatible with the reason giving rise to the rule and the treaty.

<sup>13</sup> The power of sale conferred by Act of March 28, 1918, Public, No. 109, 65th Cong., does not appear to have been wisely used, for many sales of investments were made at sacrifice prices, from which the country derived no benefit. The only ones profiting were some American citizens who picked up bargains. The whole matter of sales should be thoroughly investigated.

<sup>14</sup> Note 3, *supra*, at p. 834.

<sup>15</sup> *Re Munster* (1920, Ch.) 122 L. T. R. 411.

<sup>16</sup> *Stevensón v. Akt. für Cartonnagen-Industrie*, *supra* note 3.

<sup>17</sup> (1921) 41 Sup. Ct. 293, 298.

<sup>18</sup> Revived by treaty of 1828, Art. 12, 8 Stat. at L. 174.

<sup>19</sup> F. E. Farrer in (1921) 37 L. QUAR. REV. 218, 226. Story's view is disclosed in *Brown v. United States* (1814, U. S.) 8 Cranch, 110, 144.

The policy with respect to the German sequestrated property is to be determined by Congress. The Knox Resolution makes its eventual return to its owners conditional upon the satisfaction by Germany of the claims of American citizens, but does not assure its return. Commercial policy dictated the decadence of the old practice of confiscation.<sup>20</sup> The like consideration is operative to-day, with greater force than ever. Any confiscation of the property, in whole or in part, would retard the development of the world's resources by imperilling foreign investment, would promote armament by making the safety not merely of public but of private property depend upon success in arms, and would loosen one of the most fundamental of the props of the existing economic and social structure, by undermining the security of private property. A reversion to the obsolete practice of confiscation is fraught with immeasurable danger to the supremacy of law.

E. M. B.

#### ACCELERATION OF REMAINDERS

The theory of acceleration proceeds upon the supposition that, although the ulterior devise or grant is in terms not to take effect in possession until the decease of the prior life tenant, yet, in point of fact, it is to be read as a limitation of a remainder to take effect in every event which removes the prior estate.<sup>1</sup> At common law a strict legal remainder had to be supported by a valid particular freehold estate and had to be so limited as to take effect *eo instante* on the termination of the estate.<sup>2</sup> The feudal system required some responsible person to be available at all times to perform the feudal services which became an inseparable adjunct to the seisin. Thus it followed necessarily that the seisin had to be in some definite person. Consequently in a feoffment to A for life remainder to B, if A was a monk incapable of taking, B's remainder was bad,<sup>3</sup> as the law would not permit the seisin to be in abeyance until A's death. But if a home for the seisin was provided and it once passed from the grantor, as in a case where the first limitation is valid, an ulterior limitation following an intervening void estate was saved by accelerating it upon the destruction of the

<sup>20</sup> The original relaxation of the practice of confiscation was probably due to the general conviction, of mutual advantage, that those surviving the devastating effects of unmitigated war should have something with which to take up again the thread of life.

<sup>1</sup> Jarman, *Wills* (6th ed. 1910) 719. For an excellent discussion of acceleration of remainders and a collection of common-law authority, see Farrar, *Acceleration of Remainders* (1916) 32 L. QUAR. REV. 392; Sweet, *Acceleration of Future Interests* (1917) 61 SOL. JOUR. 573, 588.

<sup>2</sup> Tiffany, *Real Property* (2d ed. 1920) secs. 135, 136; Gray, *Perpetuities* (3d ed. 1915) sec. 8; Perkins, *Conveyancing* (15th ed. 1792) sec. 568; 18 Vin. Abr. tit. Remainder, c. 1, 4, 5, 6, 7.

<sup>3</sup> Preston, *Estates* (2d ed. 1828) sec. 119; Perkins, *loc. cit.*; Tiffany, *loc. cit.*; Gray, *loc. cit.*

particular intermediate estate.<sup>4</sup> For example in a feoffment to A for life, remainder to B for life, remainder to C in fee, where B's estate is avoided, C's estate is accelerated on the termination of A's. However, if there was a person on hand to perform the feudal services, as in the case of the determination of the particular estate by a re-entry upon a condition affecting only the particular estate, the remainder could depend upon the estate *pur autre vie* and was not accelerated.<sup>5</sup> The effect of a disclaimer by the tenant of the particular estate is in dispute, but it appears not to have made such estate void *ab initio*, (providing the estate had once vested in the disclaimer) so as to defeat a remainder, although it caused no acceleration of it.<sup>6</sup>

The underlying purpose of the Statute of Wills, as well as of local customs prior to it, was to enable the owner of land to give his property to whom he desired, and so naturally the courts endeavored to give effect to the intention of the testator. Therefore limitations in wills were more liberally treated, and a remainder was accelerated where the particular estate was void in its inception,<sup>7</sup> or disclaimed,<sup>8</sup> or where a void intervening particular estate followed a valid prior estate which failed.<sup>9</sup>

<sup>4</sup> Perkins, *op. cit.*, secs. 566; 1 Sheppard, *Touchstone* (1st Amer. ed. 1808) sec. 435; *Maud's Case* (1333) Y. B. 7 Edw. III, p. 19, pl. 24; *Carrick v. Errington* (1726, Ch.) 2 P. Wms. 36r. The limitations in the latter case were to A for life, remainder to B, a papist, remainder to trustees for the life of B in trust to let B take the profits, and to preserve the contingent remainders, remainder to B's sons in tail male, remainder to C. A died and B could not take because of the statute against the papists. The court held that the trustee's estate was accelerated but not that of C, and that the rents and profits should go to the grantor's heirs during B's life or until he should have a protestant son. See note 25 *infra*.

<sup>5</sup> Perkins, *op. cit.*, sec. 565; 2 Co. Lit. 298a.

<sup>6</sup> Co. Lit. 298a. An estate could be forced surreptitiously upon a person, and even though later disclaimed, it was sufficient to support a remainder. See 2 Coke, *Institutes*, 286; Statham Abr. (Klingersmith's ed. 1915) tit. Disclaimer (10); Perkins, *op. cit.*, secs. 44, 45. The question rarely arose at common law as to the effect of a disclaimer, as the feoffee had to be present, and if at the moment of enfeoffing he refused to take, no estate passed. On this ground, that the disclaimer never had even an estate surreptitiously forced upon him, most of the authority to the contrary can be distinguished. As to duties or liabilities in the disclaimer, the disclaimer cleared him *ab initio*. See 61 SOL. JOUR. 573; Sheppard, *op. cit.*, 285; *Re Wimpey* [1914] 1 Ch. 502. For both views see 61 SOL. JOUR. 573, 588, 608, 627, 642; 33 L. QUAR. REV. 132, 254.

<sup>7</sup> Tiffany, *op. cit.*, sec. 146; Jarman, *op. cit.*, 718-719; Perkins, *op. cit.*, sec. 567; Co. Lit. 298a. For example, in a devise to A, a monk, for life, remainder to B in fee, the remainder was good although A's estate was void.

<sup>8</sup> Perkins, *op. cit.*, sec. 569; *Archbishop Cranmer's case*, (1572, K. B.) 3 Dyer, 309a; *Jull v. Jacob* (1876) L. R. 3 Ch. Div. 703; see American cases, note 13 *infra*. E.g., a devise to A for life, remainder to B in fee; A disclaims; B's remainder is accelerated.

<sup>9</sup> Perkins, *op. cit.*, sec. 566; see note 4 *supra*. E.g., a devise or grant to A for life, remainder to B, a monk, for life, remainder to C; A dies; C's estate is accelerated.

The doctrine of seisin did not have the same effect in cases involving equitable estates. The legal estate was vested in the feoffee to uses; so the feudal desideratum, a person to perform the required services, was not wanting.<sup>10</sup> There was no crying need of acceleration to save the equitable remainder. As a result there grew up the doctrine that where the limitation was by deed or will to trustees and the limitation of a prior equitable particular estate was void, subsequent equitable or legal remainders were not accelerated unless such acceleration was necessary to carry out the clearly expressed intention of the grantor or testator.<sup>11</sup> Instead there was a resulting use to the grantor's or the testator's heirs.<sup>12</sup>

The American cases seem to deal chiefly with devises. A vested legal or equitable remainder is accelerated, following the common-law rules, on the destruction of the prior particular estate, either by disclaiming,<sup>13</sup> or by the death of the life tenant in the testator's lifetime.<sup>14</sup> The widow sometimes throws into confusion the testator's plan of disposition by renouncing a life interest given under the will and electing to take her statutory dower rights. When the amount

<sup>10</sup> See, Farrar, *op. cit.*, 32 L. QUAR. REV. 400.

<sup>11</sup> *Carrick v. Errington*, *supra* note 4; *Lainson v. Lainson* (1853, Ch.) 18 Beav. 1; *Sidney v. Shelley* (1815, Ch.) 19 Ves. 352; Fearne, *Contingent Remainders* (1st Amer. ed. 1819) 221, Butler's note; see Jarman, *op. cit.*, 719.

<sup>12</sup> Lewin, *Trusts* (12th ed. 1911) 178; Jarman, *op. cit.*, 704; Tiffany, *op. cit.*, sec. 101; *Sidney v. Shelley*, *supra*. This case was a devise to trustees to uses for 99 years, with limitations over. No uses were later mentioned in the will and so the question arose over the disposition of the term. The Lord Chancellor said: "I agree, a voluntary settlement must be taken as I find it. If it is by deed, I must give it its legal effect; and cannot consider the intention in the same ways as I could upon a will; but upon a marriage settlement this court is to look at the contract, and upon the intention of the parties, and give the beneficial interest so that the intention may be satisfied." The decision was against the heir because of the expressed intention of the testator.

A deed operating under the Statute of Uses would not give rise to a resulting use if there was consideration. See Lewin, *op. cit.*, 164 (4). There probably would be an acceleration of the remainder. See Co. Lit. 298a, 272a. In the United States the doctrine of resulting uses never gained much strength even in voluntary conveyances. See Tiffany, *op. cit.*, sec. 107 (b).

<sup>13</sup> *Hesseltine v. Partridge* (1920) 236 Mass. 77, 127 N. E. 429, is a typical example. The devise was of realty to A for life, remainder to B and C. A renounced and took her dower interest. B's and C's estates were accelerated. *Slocum v. Hagerman* (1898) 176 Ill. 533, 52 N. E. 332; *Parker v. Ross* (1898) 69 N. H. 213, 45 Atl. 576; *Adams v. Gillespie* (1855) 55 N. C. 244 (gift of personalty); *Dean v. Hart* (1878) 62 Ala. 308; *In Re Rawlings* (1891) 81 Iowa, 701, 47 N. W. 992. See also Jarman, *op. cit.*, 719, 720; Tiffany, *op. cit.*, sec. 146, accord.

<sup>14</sup> *Morris v. Philips* (1919) 287 Ill. 633, 122 N. E. 831. Here the devise was to A's children subject to a life estate in A. A died before the testator, and it was held that the children's remainder was accelerated.

*Thornton v. Thompson* (1908) 197 Mass. 273, 83 N. E. 880; *Lyford v. McFetridge* (1917) 228 Mass. 285, 117 N. E. 589 (both the testator and life tenant were killed at the same time in an accident) accord.

so taken exceeds the value of the life interest given under the will so as to diminish the gifts limited to others after the termination of the widow's life interest, specific legacies are not accelerated at the expense of a residuary legatee, but the balance of the estate remaining, after the widow's statutory share is paid, is allowed to accumulate until her death.<sup>15</sup> In a few jurisdictions the effect on the residuary legatee of the widow's election is not taken into consideration and renunciation is held to be the equivalent of death.<sup>16</sup> When all the legatees are affected equally, the reason for not accelerating the subsequently limited gifts fails, and acceleration takes place.<sup>17</sup> Similarly, vested legacies following a void trust are advanced.<sup>18</sup>

A contingent remainder by its very nature can never be accelerated. Bearing in mind the fundamental rule that the intention of the testator governs, when the persons who are to take cannot be identified from the description in the will until the happening of some future event, it follows that there cannot be acceleration without violating the testator's expressed intention.<sup>19</sup>

<sup>15</sup> *Sellick v. Sellick* (1919) 207 Mich. 194, 173 N. W. 609; *Hinkley v. House of Refuge* (1874) 40 Md. 461; *Firth v. Denny* (1861, Mass.) 2 Allen, 468; *Holdren v. Holdren* (1908) 78 Ohio St. 276, 85 N. E. 537; *Dale v. Bartley* (1877) 58 Ind. 101; *Jones v. Knappen* (1891) 63 Vt. 391, 22 Atl. 630; *Cotten v. Fletcher* (1914) 77 N. H. 216, 90 Atl. 510; see 1 Woerner, *Administration* (2d ed. 1899) sec. 119.

<sup>16</sup> *Coover's Appeal* (1873) 74 Pa. 143; *In Re Schultz* (1897) 113 Mich. 592, 71 N. W. 1079 (overruled by *Sellick v. Sellick*, *supra*, as regards the point in discussion); *In Re Ferguson's Appeal* (1890) 138 Pa. 208, 20 Atl. 945; *Trustees of Church Home v. Morris* (1896) 99 Ky. 317, 36 S. W. 2 (this case was decided on the ground that the primary objects of the testator's bounty were the specific legatees, and so acceleration was granted despite the injury to the residuary legatee). See Woerner, *loc. cit.*

<sup>17</sup> *Randall v. Randall* (1897) 85 Md. 430, 37 Atl. 209; *Parker v. Ross* (1897) 69 N. H. 213, 45 Atl. 576; *Fox v. Rumery* (1878) 68 Me. 121; *Robinson v. Harrison* (1874) 2 Tenn. Ch. 11.

<sup>18</sup> In a devise to trustees for five years, and then over to charitable institutions, where the trust was void under the New York statute, it was held that the remainder could be accelerated, as it was vested. *In re Hitchcock* (1917) 222 N. Y. 57, 118 N. E. 220. But those gifts which are to be paid out of the trust are void, though the gift over of the corpus of the estate is accelerated. *In re McQueens* (1917, Surro.) 99 Misc. 185, 163 N. Y. Supp. 287; *Maynard v. Maynard* (1919, Sup Ct.) 108 Misc. 362, 178 N. Y. Supp. 329. See 1 Jarman, *op. cit.*, 723.

If the remainders are contingent after a void trust, they cannot be accelerated and fall with the trust. *In re Silsby* (1920) 229 N. Y. 396, 128 N. E. 212. Cf. *Thistle's Estate* (1919) 263 Pa. 60, 106 Atl. 94 (contingent remainders dependent upon a void accumulation clause).

<sup>19</sup> In a recent Kentucky case the limitations of a devise were to trustees to pay the income to the testator's wife for life, and after her death to B and C equally and the whole income to the survivor, then to convert the whole estate into cash and divide it among the *then* living descendants of C *per stirpes*. The wife and B died. C was about seventy years old and wished to release to



There remains to be considered the question of accelerating a vested remainder preceded by an intervening contingent remainder.<sup>20</sup> At common law upon the failure of the particular estate the contingent remainder was destroyed unless saved by a trust,<sup>21</sup> but modern statutes generally render it indestructible.<sup>22</sup> The question now arises, under the statute, as to who is entitled to the rents and profits during the interim, as between the heir of the testator or the grantor and the holder of the next vested estate. In the case of equitable limitations there is little difficulty in applying the common-law rules,<sup>23</sup> and, where it clearly appears to be the intention of the testator or grantor to disinherit his heirs, the remainder is accelerated, subject to a shifting use if the contingent remainder should vest. This view has been adopted by two recent English cases.<sup>24</sup> The doctrine of seisin interferes in the case of legal remainders. For the seisin, once vested in the remainderman, cannot be taken back, or in other words, there can be no shifting legal estate at common law.<sup>25</sup> A relic of feudalism,

his children. One child refused to join. It was held that the remainders were contingent, as the persons described could not be identified until C died, and there could be no acceleration. *Keeton v. Tipton* (1919) 184 Ky. 704, 212 S. W. 909. See also *Page v. Rouss* (1920, W. Va.) 103 S. E. 289; *Compton v. Rixey* (1919) 124 Va. 548, 98 S. E. 651; *Blatchford v. Newberry* (1880) 99 Ill. 11 (good collection of early authority); *Toombs v. Spratlin* (1907) 127 Ga. 766, 57 S. E. 59; *Swann v. Austell* (1918, C. C. A. 5th) 261 Fed. 465; *Miller v. Miller* (1913) 91 Kan., 136 Pac. 953 (conveyance by deed).

In *O'Rear v. Bogie* (1914) 157 Ky. 666, 163 S. W. 1107, which seems to hold that a contingent remainder may be accelerated, it is to be noted that the contingent remainderman and the heir on whom the estate would have fallen in the event of the court declaring an intestacy were the same person.

<sup>20</sup> Limitations to trustees in fee upon trust for A for life, remainder to A's first and other sons in tail, remainder to B and C successively for life, remainder over. A disclaimed. The contingent remainders to A's sons were preserved by statute. The question is who is entitled to the rents and profits until the vesting of the contingent remainder. *In re Willis* [1917] 1 Ch. 365. See Jarman, *op. cit.*, 719, 953; Co. Lit. 55 b, n. 8.

<sup>21</sup> See Gray, *op. cit.*, sec. 10, Tiffany, *op. cit.*, sec. 140.

<sup>22</sup> See Tiffany, *op. cit.*, secs. 177, 178.

<sup>23</sup> See notes 11 and 12 *supra*.

<sup>24</sup> *In Re Conyngham* [1920] 2 Ch. 495 (where the gift was revoked by a codicil in the will); *In re Willis*, *supra* note 20.

This is really treating the contingent remainder preserved by statute as an executory limitation and applying the common-law rules. See Saunders, *Uses and Trusts* (2d Amer. ed. 1850) 358. It is again a question of the intention of the testator. Cf. *In Re Townsend's Estate* (1886) L. R. 34 Ch. Div. 357.

<sup>25</sup> *In Re Scott* [1911] 2 Ch. 374. A devise to the use of A for life, remainder to his first and other sons in tail, remainder to B, remainder over. A disclaimed. The contingent remainders were saved by statute. It was held that B's interest was not accelerated. The decision was based on *Carrick v. Errington*, *supra* note 4. In that case, however, if the trustees' estate had passed to the remainderman, the contingent remainders would have failed and the very object of the trust would have been defeated. The difficulty in applying the same rules to legal

this need of a definite person to respond to the call for feudal services, is the reason for this distinction, though why the remainderman will not serve this present fictitious purpose as well as the heir is not quite clear. Clearly a contingent remainder, preserved after the particular estate is destroyed, has much the same character as an executory limitation. The common-law theory of seisin has already been modified to a great extent to meet the exigencies of modern conditions.<sup>28</sup> It would not be doing any great violence to this moribund doctrine to permit such legal remainders to be accelerated subject to the executory contingent remainder, provided it was the intention of the testator to disinherit his heir.

#### ADMISSIBILITY OF INCOME TAX RETURN TO PROVE EARNING CAPACITY

The recent case of *Veatch's Adm'r v. Louisville Ry.* (1921, Ky.) 228 S. W. 35, raises the interesting question whether an income tax return is admissible in evidence to prove the earning capacity of a decedent. In this case the administrator sued for the wrongful death of his intestate, and, to prove her earning capacity, offered a certified income tax return made shortly prior to her death. The court excluded the evidence on the ground that it was a self-serving declaration. The court argued that, since the tendency is to make the tax as small as possible, the return is a declaration in the interest of the declarant. Regarded in this aspect, an absolutely bona fide statement, although neutral, is also inadmissible, since only declarations *against* interest are recognized as exceptions to the hearsay rule.<sup>1</sup> But when A makes an income tax return, he at once subjects himself to a pecuniary liability to the government proportional to his admitted income. In this aspect the return is against interest.<sup>2</sup> Where a declaration has two aspects, it is competent in so far as it tends to prove the matter against interest.<sup>3</sup>

The recognized exceptions to the hearsay rule are based upon necessity and trustworthiness.<sup>4</sup> In the instant case the necessity exists,

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limitations as govern equitable limitations, is the conception of seisin which prevented an executory use at common law. The freehold had to pass out of the grantor. If it passed to a vested remainder limited after a contingent remainder, then the contingent remainder was extinguished. *Fearne, op. cit.*, 281.

<sup>28</sup> *Finch, Seisin* (1919) 4 CORN. L. QUAR. 1.

<sup>1</sup> *Page v. Cave* (1920, Vt.) 111 Atl. 398; *Chiles v. Bowyer* (1920, Va.) 103 S. E. 619.

<sup>2</sup> *Wigmore, Evidence* (1904) secs. 1461, 1463; *Humes v. O'Bryan & Washington* (1883) 74 Ala. 79. For the purposes for which the income tax return is made, it is against the declarant's interest to admit that he has any income beyond the amount that is exempt from the tax. A return showing no income subject to tax would not be against interest.

<sup>3</sup> *Wigmore, op. cit.*, sec. 1458.

<sup>4</sup> *Wigmore, op. cit.*, secs. 1421, 1422.

since the declarant is dead. Also there is a guaranty of trustworthiness, because the return is made under oath, and the penalty for dishonesty is so heavy that the gain is hardly worth the chance. Thus, since it appears that the return is against interest, and since it fulfills the requirements of necessity and trustworthiness, it would seem that the return should not have been excluded as incompetent.

Another question involved here, however, is one of relevancy. Damages are assessed in part according to the pecuniary loss to an estate by reason of injury or death, and this loss is determined by ascertaining the earning capacity of the injured or deceased party.<sup>5</sup> If the income of a party falls solely under the classification of salaries, wages, fees, and commissions, then the return clearly shows the earning capacity and is relevant.<sup>6</sup> Where, however, part of the income is derived from investments, then only that part of the return relating to earning capacity is relevant, and only that part should go to the jury. When the income is classified under the head "earnings," and is derived from running a store, as in the instant case, the income from investments is not separated from income from personal services. The return then furnishes the jury with no information from which to determine earning capacity unless the amount of the investment is ascertained and the profit derived from this is subtracted from the total income. In the instant case it seems that the court should have excluded the evidence, but not for the reason given.

#### OVERLOOKING STATUTES

In an appeal recently argued before the House of Lords, a statute which might have had a considerable bearing upon the case was entirely overlooked in the lower court. Nor was it discovered until the appellate court came across it in considering the decision. Notice was given that a further argument of the appeal was desired and the Lord Chancellor, in addressing counsel, said:

"It is not possible in the ordinary course for their Lordships to be aware of all the authorities, statutory and otherwise, which might be relevant to the issues in the particular case. Their Lordships are in the hands of counsel and those that instruct counsel, and it is the practice of the House to expect, and even to insist, that authorities that bear one way or another upon matters in debate, shall be brought by counsel to their attention."

*Glebe Sugar Refining Co. v. Trustees of Greenock* [1921] W. N. 861.

This incident raises the interesting question as to what should be the procedure when a statute, material to the issue, or controlling it, is

<sup>5</sup> See *Patterson v. Williams* (1920, Tex. Civ. App.) 225 S. W. 89; L. R. A. 1918 E, 280, note.

<sup>6</sup> See *Montgomery, Excess Profits Tax Procedure* (1921) 514.

entirely overlooked. Professional ethics require that counsel make a thorough and diligent search for all the authorities in point. The fact that there are few cases in the books where statutes have been completely overlooked is a tribute to the diligence that is usually exercised. But even an attorney is not infallible and the presumption that he knows all the law is an unfair one. A thorough knowledge of the law is the working tool of every able lawyer. Likewise, it is the chief qualification of the judge on the bench. The court is bound to take judicial notice of the laws of its jurisdiction,<sup>1</sup> and, even though these laws are not specially pleaded or are not mentioned in the course of trial, yet the court, using them as a part of its legal equipment, may nevertheless give them consideration in determining the case.

There is a general rule, not consistently followed, that points not raised in the trial court cannot be urged on appeal. Thus a failure to offer the statute of frauds as a defense in the lower court makes it impossible to use it on appeal.<sup>2</sup> The same rule has been applied to the statute of limitations.<sup>3</sup> In both of these classes of cases the statute offered a good defence, but one of such a nature that the parties could waive it without doing an injustice. It has been held that a claim of unconstitutionality must be made in the trial court.<sup>4</sup> The issue of public policy may, however, be raised for the first time on appeal,<sup>5</sup> and this must necessarily be so, for the appellate court is presumably the determining agency of the law of the state. In cases recently arising in Massachusetts and Alabama where statutes required motor vehicles and operators to be licensed and the courts had held that the failure to be so licensed made the parties trespassers unlawfully upon the road, the appellate court refused to consider these statutes for the first time on appeal.<sup>6</sup> Here the statutes were positive in their nature, concerned the substantive rights of the parties, and were the law of the jurisdiction. The purpose of pleadings is to define the issues, and, had the appellate courts considered these statutes on appeal, the cases would have been decided upon an entirely different theory upon which no evidence had

<sup>1</sup> 4 Wigmore, *Evidence* (1905) secs. 2572, 2573.

<sup>2</sup> *Goldman v. Cohen* (1915) 167 App. Div. 666, 153 N. Y. Supp. 41; *Armstrong v. Barceloux* (1917) 34 Calif. App. 433, 167 Pac. 895; *Kendall v. Metroz* (1918) 65 Colo. 387, 176 Pac. 473; *Bennett v. Denton* (1917) 194 Mich. 610, 101 N. W. 831; *U. S. Rubber Co. v. Silverstein* (1920) 229 N. Y. 168, 128 N. E. 123.

<sup>3</sup> *Cubit v. Jackson* (1917, Tex.) 194 S. W. 594; *Vazio v. Zimmer* (1919, Mo.) 209 S. W. 909. *Dworkin v. Caledonian Ins. Co.* (1917, Mo.) 191 S. W. 1092.

<sup>4</sup> *State, ex rel. Jones, v. Howe Scale Co.* (1913) 253 Mo. 63, 161 S. W. 789.

<sup>5</sup> *Ellis v. Frawley* (1917) 165 Wis. 381, 161 N. W. 364; *Daucet v. Mass. Bonding & Ins. Co.* (1917) 180 App. Div. 599, 167 N. Y. Supp. 892. But see *Boston Piano Co. v. Pontiac Clothing Co.* (1917) 199 Mich. 141, 165 N. W. 856. In this case the contract in question was like those already considered and held illegal in two cases previously decided in the same court. Yet the illegality, not having been urged in this case in the trial court, could not be considered on appeal.

<sup>6</sup> *Littlefield v. Gilman* (1911) 207 Mass. 539, 93 N. E. 809; *Atlantic Coast Line v. Kelly* (1918) 16 Ala. App. 360, 77 So. 972.

been received under the pleadings in the lower court. It has been held that a state court is not bound to take judicial notice of a ruling of the Interstate Commerce Commission, and that the failure to plead such a ruling in the trial court precluded its consideration on appeal.<sup>7</sup> There has been a suggestion in some of the cases that the Federal Employers' Liability Act cannot be urged for the first time in the appellate court, but these cases apparently turn on the point that sufficient facts were not pleaded below to bring the case within the statute.<sup>8</sup>

The question of overlooking statutes has been given sensible and consistent treatment in Connecticut. In *Cunningham v. Cunningham*<sup>9</sup> a statute giving a deserted wife a right of action to secure an order for support was entirely overlooked by the trial court, as was a statute governing a rule of procedure in *Salewski v. The Waterbury Manufacturing Co.*<sup>10</sup> But in both cases the appellate court considered the statutes. In the case of *Schmidt v. Manchester*<sup>11</sup> the question was as to the sufficiency of a notice of defect in a highway and the trial court entirely overlooked a statute, which, upon appeal, was held to be determinative of the case. In all of these cases the substantive rights of the parties would have been materially affected had the statutes not been considered. But the point, in each case, was raised below, although no mention was made of the statutory authority, so that the appellee was not deprived of any defence that he did not have in the trial court.

The trial of a cause is not a game but a search for truth and justice, and it is submitted that an appellate court should consider any statutory authority material to the issue, whether or not it was raised in the trial court. The failure to mention a statute may well be held to operate as a waiver in those cases where the interests of the public are not directly involved and where an express waiver would be held operative. In general, statutes are "the law of the land" which courts are bound to apply. Errors arising from ignorance of a statute should be corrected on appeal and a new trial granted if necessary in order to secure a proper presentation of the facts in the light of the statute.<sup>12</sup>

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<sup>7</sup> *Banaka v. Mo. Pac. Ry.* (1910) 193 Mo. App. 345, 186 S. W. 7; *Keeney v. Chic., B., & O. Ry.* (1918) 183 Iowa, 522, 167 N. W. 475.

<sup>8</sup> *Rogers v. N. Y. C. & H. R. Ry.* (1916) 171 App. Div. 385, 157 N. Y. Supp. 83; *Ford v. Dickinson* (1919, Mo.) 217 S. W. 294. The better rule seems to be that the state courts are bound to take judicial notice of the Federal Employers' Liability Act, and that it need not be pleaded, but that it is merely necessary to state sufficient facts to bring the case within the act. 47 L. R. A. (N. S.) 75, note; L. R. A. 1915 C, 78, note.

<sup>9</sup> (1899) 72 Conn. 157, 44 Atl. 41.

<sup>10</sup> (1914) 89 Conn. 46, 92 Atl. 682.

<sup>11</sup> (1918) 92 Conn. 551, 103 Atl. 654.

<sup>12</sup> *Fourth Nat. Bank v. Franklyn* (1886) 120 U. S. 747, 751, 7 Sup. Ct. 757, 759; see *Hart v. Adair* (1917, C. C. A. 9th) 244 Fed. 897.

When a court *sua sponte* dismisses a case on a doubt as to its jurisdiction, there ought to be plausible ground justifying the doubt. The Circuit Court of Appeals of the Third Circuit in the case of *Garvan v. Kogler*, March Term, 1921, No. 2863, has recently dismissed a complaint for debt, brought under section 9 of the Trading with the Enemy Act, of a resident of the United States against the Alien Property Custodian, appearing on behalf of a German non-resident debtor, on the ground that it did not appear clearly to the court that the plaintiff was not an "enemy or ally of enemy." Between the parties there was no such issue, and it was not apparently raised at the trial. This was doubtless due to the fact that section 2 of the Trading with the Enemy Act (40 Stat. at L. 411, 419) expressly excludes residents of the United States (except internees under Presidential proclamation) from the category of "enemy." The court seems to have confused citizenship with domicil, the test of enemy character under the Trading with the Enemy Act, and to have been unfamiliar with section 2, which seems to settle any doubt it might have had. When an appellate court adopts the unusual practice of dismissing a complaint *sua sponte* for want of jurisdiction it should have some slight legal justification.